

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2222 OF 2004

Vidyadhar Pandurang Rane,)
a citizen of India, residing at)
42/1037, Mumbai Port Trust,)
New Colony, Wadala,)
Mumbai - 400 037.).. Petitioner

Vs.

1. Board of Trustees of Port of)
Mumbai, a statutory body)
constituted under the)
Major Port Trusts Act, 1963,)
having registered office at)
Port House, Shoorji Vallabhdas)
Marg, Ballard Estate,)
Mumbai - 400 038.)
2. The Chairman,)
Mumbai Port Trust,)
having office at Port House,)
Shoorji Vallabhdas Marg,)
Ballard Estate, Mumbai 400 038.)
3. The I/C Chief Medical Officer,)
Mumbai Port Trust,)
having office at Port Trust)
Hospital, Wadala,)
Mumbai - 400 037.).. Respondents

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Shri Jaiprakash Sawant for the Petitioner.

Shri H.J. Shah i/b M/s.Mulla & Mulla & Craigie Blunt
and Caroe for the respondents.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 30th SEPTEMBER, 2004.

JUDGMENT:

1. Heard the learned advocates for the parties.
Perused the records.

2. Rule. By consent, the rule is made returnable forthwith.

3. The petitioner challenges the order dated 17th May, 2004 passed by the respondent No.2 rejecting the request of the petitioner for availing defence assistant by the office bearer of the union on the ground that such an office bearer is a practising advocate and that, therefore, the same is not permissible in terms of the Rule 12(8) of the Bombay Port Trust Employees' (Classification, Control and Appeal) Regulations, 1976, (hereinafter referred to as "the said Regulations").

4. Few facts relevant for the decision are that, the petitioner, who is an employee of the 1st respondent and working in the capacity as Driver in the Medical Department at Mumbai Port Trust, was served upon a charge sheet dated 10th February, 2004 alleging misconduct. It was served by the respondent No.3, who is Disciplinary Authority of the petitioner. The same was served upon the petitioner on 10th February, 2004. By an order dated 23rd March, 2004, the respondent No.3 appointed herself as the Enquiry Officer to enquire into the charges framed against the petitioner. By letter dated 6th April, 2004, the

petitioner informed the respondent No.3 that Shri Jaiprakash Sawant, Vice President of the union, would be assisting the petitioner in the inquiry. The respondent No.3, however, disallowed the said Shri Sawant to assist the petitioner on the ground that he is a practising advocate, even though he happens to be the Vice President of the Union. By a representation dated 15th April, 2004, the petitioner sought to draw attention of the respondent No.3 to the Rule 12(8) of the said Regulations which, according to the petitioner, permits an assistance of an office bearer of a trade union in such inquiry irrespective of the fact that he is a legal practitioner. The respondent No.3 thereupon by a letter dated 17th April, 2004 informed the petitioner that the petitioner was at liberty to appoint any other office bearer of a union, who is not a legal practitioner. The matter was thereupon referred to the respondent No.2, in accordance with the Rule 32 of the said Regulations pursuant to the petitioner's representation dated 23rd April, 2004. The respondent No.3 thereafter by a letter dated 25th May, 2004 informed the petitioner that the Chairman, by his order dated 17th May, 2004, has rejected the appeal of the petitioner and that, therefore, he may engage any office bearer of the union as his defence assistant, but, such a person should not be a legal practitioner. Hence the present

petition.

5. Assailing the impugned order, the learned advocate appearing for the petitioner submitted that the Rule 12(8) of the said Regulations clearly entitles an employee, as a matter of right, to secure the assistance of any other employee and if the employee happens to be of a Class III and a Class IV then any office-bearer, as defined in clause (b) of Section 2 of the Indian Trade Unions Act, 1926, and that merely because such an office bearer happens to be a legal practitioner, and for that matter, even a medical practitioner or an engineer, would not debar him from assisting the employee. Drawing attention to the phraseology used in relation to the prohibition for a legal practitioner to represent the employee in such inquiry, the learned advocate for the petitioner submitted that the bar is against "engaging" the legal practitioner, which means "employing for monetary consideration" and not securing the assistance as "fellow brother" in the establishment or being an "active worker" of the union which would include its office bearer. Laying stress on the word "engage" in the Rule 12(8) of the said Regulations, it was sought to be argued that the same denotes availing services of a legal practitioner in his professional capacity as an advocate and not as a friend or a well-wisher,

who actively participates in the welfare movement for the workers or the employees. In case of securing assistance of an office bearer irrespective of the fact that such a person happens to be a practising advocate in the process of inquiry, there is no relationship of lawyer and client between such office bearer and delinquent or an employee facing inquiry, and, therefore, it cannot be said that securing assistance of an office bearer, which happens to be a legal practitioner, would also amount to engaging a legal practitioner within the meaning of the expression under the said provisions of law. Reliance was sought to be placed in the decisions of the Apex Court in the matter of **Paradip Port Trust, Paradip v. Their Workmen**, reported in AIR 1977 SC 36 as also in the matter of **Indian Overseas Bank v. Indian Overseas Bank Officers' Association & Anr.**, reported in (2001) 9 SCC 540, and in the matter of **Bhaiji v. Sub-Divisional Officer, Thandla & Ors.**, reported in (2003) 1 SCC 692.

6. The learned advocate appearing for the respondents, on the other hand, submitted that it is well settled that the representation by a lawyer in a domestic inquiry is not a fundamental right of a workman and it squarely depends upon the provisions of law governing the service conditions of the employees.

Drawing attention to the decision of the Apex Court in **Crescent Dyes and Chemicals Ltd. v. Ram Naresh Tripathi**, reported in (1993) 2 SCC 115, it was submitted that in view of the specific provision comprised under the Rule 12(8) of the said Regulations debarring a legal practitioner from representing the employees, merely because such a practising advocate happens to be an office bearer of the union that would not entitle him to represent the workman in the domestic inquiry. Referring to the said rules and refuting the contentions on behalf of the advocate for the petitioner, it was submitted that the prohibition against a legal practitioner representing an employee in a domestic inquiry is a part and parcel of the provision, which enables an employee to secure assistance of other employee or of an office bearer of the union and the said prohibition cannot be read disjunctively nor the expression "engage" found in the Rule 12(8) of the said Regulations can be construed to mean only relationship between the lawyer and the client.

7. The law regarding the right of an employee to engage an advocate or a legal practitioner in a domestic inquiry is well settled. There is no fundamental right to any employee to be represented by an advocate in a domestic inquiry. It would all

depend upon the rules governing the domestic inquiries applicable to the concerned parties. Even in **Paradip Port Trust's case (supra)**, it was clearly held that the lawyer simpliciter cannot appear before the Industrial Tribunal without the consent of the opposite party and the leave of the Tribunal. It is, therefore, cannot be disputed that the lawyers and the advocates cannot insist as a matter of right to represent the employees or the workmen in domestic inquiries.

8. The rule governing the parties as comprised under the Rule 12(8) of the said Regulations also clearly debars a legal practitioner from being engaged by the employees in such domestic inquiries. The said rule reads thus:-

"12(8) The employee may take the assistance of any other employee or, if the employee is a class III or a class IV employee, of an "office-bearer" as defined in clause (d) of section 2 of the Indian Trade Unions Act, 1926 (16 of 1926), of the union to which he belongs, to present the case on his behalf, but may not engage a legal practitioner for the purpose unless

the said Presenting Officer appointed by the disciplinary authority, is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits."

Plain reading of the above rule would disclose that, there is a prohibition for the legal practitioner from representing the employees in the domestic inquiries. However, such prohibition does not apply in cases where either the Presenting Officer appointed by the disciplinary authority, himself or herself, is a legal practitioner, or in cases where the disciplinary authority having regard to the circumstances of the case permits the employee to be represented by a legal practitioner. Apart from these two exceptions, undoubtedly, the rule does not permit the employee to engage a legal practitioner to represent him in the domestic inquiry.

9. The point which arises for consideration in the case in hand is whether the expression "the office bearer" under the said rule would exclude a person when he happens to be a legal practitioner? The rule speaks of an office bearer to mean the one as defined under the provisions of law comprised under the Trade

Unions Act, 1926. Section 2(b) of the Trade Unions Act, 1926 defines the term "office-bearer" and it states that "office-bearer" in the case of a Trade Union, includes any member of the executive thereof but does not include an auditor." It means that the term "office-bearer" of a Trade Union would include every member of its executive except an auditor. While excluding the auditor from the definition of the office bearer of a Trade Union, the legislature, in its wisdom, has included every member of the executive of the union. It is pertinent to note that the definition is in the "exclusive form" and is not a "restrictive definition." Being so, while interpreting the said term, it would not be possible to exclude any member of the executive from being called as "office bearer" of the trade union irrespective of the fact whether he is a practising lawyer or a medical officer or for that matter an engineer. Considering this definition of the term "office bearer" under the Trade Unions Act, therefore, even an executive member, who happens to be a legal practitioner, would be an office bearer of such union. However, what is to be noted is that while permitting an employee to avail assistance of an office bearer of the union, the provision of law contained in the Rule 12(8) of the said Regulations does not permit the employee to engage a legal practitioner for the said purpose, except in the two

circumstances, viz. when the presenting officer himself is a legal practitioner or a disciplinary authority in a given case permits the employee to engage a legal practitioner.

10. It is therefore clear that though there is a restriction imposed against engaging a legal practitioner in a domestic inquiry by the employer, the said prohibition is not absolute but is qualified by the exceptions stated above. In other words, there is no total prohibition against the legal practitioner being engaged by the employee in the domestic inquiry. Considering the same, plain reading of the said rule would therefore disclose that only on satisfaction of the two conditions, an employee can engage a legal practitioner to represent him in the domestic inquiry and not otherwise. The learned advocate for the petitioner however, has sought to argue the restriction pertaining to the legal practitioner is to the extent of "engaging" a legal practitioner and not availing of "assistance" of an office bearer of the union who may incidentally happen to be a legal practitioner, and in that connection, attention is drawn to the provisions of Section 36(4) of the Industrial Disputes Act, 1947. Sub-section (4) of Section 36 of the Industrial Disputes Act, 1947 provides that "in any proceedings before a Labour

Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal, as the case may be." Relying upon **Paradip Port Trust's case**, it was sought to be contended that bearing in mind the phraseology of the Rule 12(8) of the said Regulations, it cannot be disputed that an advocate simpliciter cannot appear for the employee but merely because the office bearer of the union happens to be an advocate, certainly he cannot be prohibited from assisting the employee in his capacity as an office bearer of such union.

11. It is to be noted that Section 36(1) of the Industrial Disputes Act provides that a workman, who is a party to a dispute, shall be entitled to be represented in any proceedings under the Industrial Disputes Act by three classes of officers mentioned in (a), (b) and (c) of sub-section (1) of Section 36 of the Industrial Disputes Act, 1947, namely,:-

"(a) any member of the executive or other office-bearer of a registered trade union of which he is a member;

(b) any member of the executive or other

office-bearer of a federation of trade unions to which the trade union referred to in clause (a) is affiliated;

- (c) where the worker is not a member of any trade union, by any member of the executive or other office-bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorised in such manner as may be prescribed."

Sub-section (2) of Section 36 provides an employer who is a party to a dispute shall be entitled to be represented in any proceeding under the Industrial Disputes Act by -

- "(a) an officer of an association of employers of which he is a member;

- (b) an officer of a federation of associations of employers to which the association referred to in clause (a) is affiliated;

(c) where the employer is not a member of any association of employers, by an officer of any association of employers connected with, or by any other employer engaged in, the industry in which the employer is engaged and authorised in such manner as may be prescribed."

Sub-section (3) of Section 36 of the Industrial Disputes Act provides that "no party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceedings under this Act or in any proceedings before a Court."

12. The Apex Court in **Paradip Port Trust's case**,

considering the provisions of Section 36(4) of the Industrial Disputes Act, 1947, had held that if the legal practitioner is appointed as an officer of a company or Corporation and is in their pay and under their control and is not a practising advocate, the fact that he was earlier a legal practitioner or has a legal degree will not stand in the way of the company or the corporation being represented by him. Similarly if a legal practitioner is an officer of an association of employers or of a federation of such associations, there is nothing in Section 36(4) to

prevent him from appearing before the Tribunal under the provisions of Section 36(2) of the Industrial Disputes Act. It was further held that the office bearer of the trade union or a member of its executive, even though he is a legal practitioner, will be entitled to represent the workmen before the Tribunal under Section 36(1) in his former capacity.

It was ruled that :

"The legal practitioner in the above two cases will appear in the capacity of an officer of the association in the case of an employer and in the capacity of an office bearer of the union in the case of workmen and not in the capacity of a legal practitioner. The fact that a person is a legal practitioner will not affect the position if the qualifications specified in Section 36(1) and Section 36(2) are fulfilled by him."

It was also held that there is no scope for inquiry by the Tribunal into the motive for appointment of such legal practitioners as office bearers of the trade union or as the officers of the employers' association. It was clearly held that :

"A lawyer, simpliciter, cannot appear before

an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the Tribunal in the capacity of an office bearer of a registered trade union or an officer of association of employers and no consent of the other side and leave of the Tribunal will, then, be necessary. "

13. The learned advocate for the respondents sought to distinguish the said decision of the Apex Court in **Paradip Port Trust's case** by contending that the said decision was in relation to the proceedings before the Tribunal or the Court and not before the Enquiry Officer and that the Presiding Officer of a Court or a Tribunal always happens to be a trained and/or experienced person in legal proceedings and, therefore, the law laid down in relation to the proceedings before the Tribunal or the Court while interpreting Section 36 of the Industrial Disputes Act, 1947 cannot be applied to the cases in relation to the domestic inquiry and more particularly in view of the decision of the Apex Court in **Crescent Dyes and Chemicals Ltd.'s case**.

14. In **Crescent Dyes and Chemicals Ltd.'s case**

(supra), the Apex Court had held that :

"It is, therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, controlled or regulated by statute, rules, regulations or Standing Orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice insofar as the delinquent's right of hearing is concerned, cannot and does extend to a right to be represented through counsel or agent. In the instant case the delinquent's right of representation was regulated by the Standing Orders which permitted a clerk or a workman working with him in the same department to represent him and this right stood expanded on Sections 21 and 22(ii) permitting representation through an officer, staff-member or a member of the union, albeit on being authorised by the State Government. The object and

purpose of such provisions is to ensure that the domestic enquiry is completed with despatch and is not prolonged endlessly. Secondly, when the person defending the delinquent is from the department or establishment in which the delinquent is working he would be well conversant with the working of that department and the relevant rules and would, therefore, be able to render satisfactory service to the delinquent. Thirdly, not only would the entire proceedings be completed quickly but also inexpensively. It is, therefore, not correct to contend that the Standing Order or Section 22(ii) of the Act conflicts with the principles of natural justice."

15. The decision in **Crescent Dyes and Chemicals**

Ltd.'s case (supra), is, therefore, pertaining to the right of representation to the delinquent in a domestic inquiry. Undoubtedly, it says that it would depend upon the statute, rules, regulations or Standing Orders applicable to the parties. In other words, in cases where the statute, rules, regulations or standing orders permit representation by an

advocate or a legal practitioner, the delinquent would be entitled to be represented by a legal practitioner and not otherwise. Undoubtedly, the Apex Court has also enumerated the advantages of providing representation by the co-employee or co-officer from the department in which the delinquent is working including the advantage of avoiding unnecessary expenditure for engaging an advocate. The decision, however, nowhere provides that there is total prohibition for engaging an advocate or a legal practitioner by the delinquent in domestic inquiries. The decision also nowhere deals with the issue which was dealt with by the Apex Court in **Paradip Port**

Trust's case.

16. The decision in the **Paradip Port Trust's case**

(supra) is specifically on the point as to whether an office bearer, who happens to be a legal practitioner, could represent an employee. Undoubtedly, the decision was in relation to the proceedings before the Court or the Tribunal under Section 36 of the Industrial Disputes Act, 1947, but, it could hardly make any difference when the proceedings are before an inquiry officer. In both the cases, it relates to the adjudication of a dispute between the parties. Undoubtedly, in cases where the presenting officer is a legal practitioner, the employee can invariably

engage a legal practitioner. He can also avail the services of an advocate in a given case where the disciplinary authority so permits. Added to this, in other cases, the employee can avail the assistance of an office bearer of the union to which he belongs to. It is pertinent to note that the expression "office bearer" under the Rule 12(8) of the said Regulations has been specifically defined to have the same meaning as provided to the said expression under the Trade Unions Act, 1926 and, as already seen above, in terms of the definition under Section 2(b) of the Trade Unions Act, 1926, the said expression includes every member of the executive body of the union. It does not exclude any member merely because he happens to be a legal practitioner. The said definition read with the decision of the Apex Court in **Paradip Port Trust's case (supra)** wherein it has been clearly ruled that "a lawyer can appear before the Tribunal in the capacity of an office bearer of a registered trade union or an officer of association of employees and no consent of the other side and leave of the Tribunal will, then, be necessary." Considering the said law laid down by the Apex Court and considering the phraseology of the Rule 12(8) of the said Regulations, it leaves no room for doubt that the prohibition imposed against a legal practitioner being engaged in a domestic inquiry cannot apply to the cases where an office bearer

happens to be a legal practitioner. As rightly submitted by the learned advocate for the petitioner, such prohibition would arise only when a relationship of lawyer and client arises between the employee and the person engaged to represent the employee in the domestic inquiry and not when a relationship between the employee and the person appointed to assist him is that of an office bearer of the union of which the employee is the member. The learned advocate for the petitioner is also justified in pointing out the differentiation in the phraseology used in Rule 12, while referring to the right of the employee "to take assistance" of an office bearer of union, whereas while referring to prohibition for lawyers to appear for the employee, the expression used is "to engage a legal practitioner."

17. In **Alembic Chemical Works Company Ltd. & Anr.**

v. P.D.Vyas & Anr., reported in (1954) II LLJ 148, referring to Section 36 of the Industrial Disputes Act, 1947, and the issue relating to representation by the office bearer of the association and/or union, it was held that :-

".....if an officer of any trade union who is referred to in Sub-sec.36(1) as qualified to represent a workman or an

officer of an association of employees who is qualified to represent an employer under Sub-sec.(2) or an officer or director of a corporation through whom a corporation is entitled to be represented by the procedure governing the tribunal happens to be a legal practitioner, that fact by itself cannot disqualify him from appearing before the tribunal. But this presupposes that such an officer is a regular officer either of the trade union or the association or in the case of an officer of a corporation a regular officer of the corporation, and in the case of a director that he is a bona fide director not elected a director merely for the purposes of enabling him to appear in a pending proceeding before a tribunal. In other words, if a legal practitioner is transformed into an officer of a registered trade union or of an association of employers or of a corporation or is appointed a director of a corporation, in order to get over the disability imposed on a legal practitioner representing a party, then such a person shall not be allowed to appear and

represent a party. But short of an intention to circumvent the provisions of S.36(4) if a legal practitioner is ordinarily a regular officer either of a trade union or an association of employees referred to in Sec.36(1) and (2) or of a corporation or if he is a director bona fide appointed as a director. I see nothing in Sub-sec.(4) to prevent his appearing on behalf of the party merely by reason of the fact that he happens to be a legal practitioner."

Similar view was taken by the Division Bench of this Court in **A.D.Shastri v. S.D.Patil & Anr.**, reported in (1975) 1 LLJ 458, wherein it was held that the right can be exercised by the employer or the employee irrespective of the fact that the office bearer happens to be a lawyer, and that the office bearer qualified to represent the employees under sub-section (1) of Section 34 of the Industrial Disputes Act though he happens to be a lawyer is entitled in his capacity as the officer bearer to appear before the Tribunal and is not disqualified from so appearing without the consent of the other side and the question whether the employees would secure an undue advantage thereby is irrelevant to the right of representation.

The observations in both these decisions squarely apply to the Rule 12(8) of the said Regulations applicable to the parties in the matter in hand. Under Rule 12, right to seek assistance of another person is not an absolute right but is qualified in as much as that such person must be an office bearer of the union of which the employee is a member. In other words, he has to be a regular office bearer of the union and not a person appointed or elected only for the purpose of overcoming the restrictions imposed under Rule 12 regarding prohibition for legal practitioner to represent the employee.

18. The fall-out of the above discussion is that in terms of the Rule 12(8) of the said Regulations, the employee is entitled to seek assistance of the office bearer of the union to which he belongs to, in the course of domestic inquiry against such employee. It is immaterial that such office bearer happens to be a legal practitioner. Albeit, the election of such person to the Committee of the Union should not be with an intention and merely for the purpose of enabling him to assist the employee in domestic inquiries. Undoubtedly, a person who is a legal practitioner simpliciter and not an office bearer of the union, cannot, however, be engaged by the employee

in such domestic inquiry except in the circumstances specified under Rule 12(8) of the said Regulations.

19. Considering the provisions of Rule 12(8) of the said Regulations regarding entitlement of the employee to seek assistance of the office bearer of the union of which the employee is a member irrespective of the fact that such office bearer happens to be a legal practitioner, the petitioner is justified in contending that the impugned order cannot be sustained and is liable to be quashed and set aside, and the respondents are to be directed to decide the representation of the petitioner dated 23rd April, 2004 in accordance with the provisions of law and bearing in mind the observations hereinabove. Rule is therefore made absolute in terms of prayer clauses 17(a) and (b) with no order as to costs.
